No. 96-1407

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JAMES W. COLEMAN, PH.D.,

Petitioner,

—v.—

JOSEPH E. SEAGRAM & SONS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether this Court should exercise its discretionary jurisdiction to review by writ of certiorari an action in which the District Court found, after a trial on the merits in which no evidence was denied admittance by the court, that Petitioner had failed to prove that he had suffered intentional discrimination or retaliation.

Whether this Court should exercise its discretionary jurisdiction to review by writ of certiorari discovery-related decisions of the District Court which were expressly found by the Court of Appeals to have not constituted an abuse of that Court's discretion regarding discovery matters.

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JOSEPH E. SEAGRAM & SONS, INC.,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

This Brief is respectfully submitted by Respondent Joseph E. Seagram & Sons, Inc. ("Seagram" or "Company") in opposition to the Petition for Writ of Certiorari filed by Petitioner, James W. Coleman, Ph.D.[1]

[1] Pursuant to Rule 29.1 of the Supreme Court Rules, Respondent Seagram states that it is a wholly owned subsidiary of The Seagram Company, Ltd., a Canadian corporation.

STATEMENT OF THE CASE

Following a trial on the merits in which Petitioner was represented by counsel and no evidence was denied admission by the court, the District Court held as follows:[2]

> "Based on the evidence of record, plaintiff has not persuaded the court that he suffered intentional discrimination."

(Res. A-8).

Since Petitioner is unable to dispute the District Court's findings of fact and conclusions of law, he distorts and misstates the record in repeatedly contending, as the central point of his petition, that the "Sixth Circuit abused its discretion and/or committed clear and reversible error" in concluding that it found "no abuse of discretion in the district court's rulings on discovery or in the denial of the motion to amend the petition." (Pet. A-6 at 4).

This case arises out of a decision by Seagram to relocate the Research & Development Department that had formally been part of a now-closed production plant in Louisville, Kentucky, to Seagram's new Research and Technology facility in White Plains, New York. As found by the District Court below:

> "Seagram offered all salaried professional employees in Louisville, including Dr. Coleman, the opportunity to transfer to the White Plains facility. Those making the move to White Plains would work there in a position comparable to their previous position in Louisville, with comparable responsibilities, grade level, and salary.
>
> * * * *
>
> Seagram offered relocation allowances and assistance in finding homes in the White Plains area. Seagram paid

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[2] A copy of the District Court's Memorandum Opinion is attached at Appendix A-1 ("Res. A-1").

> for employees to take trips to New York to locate a new home, offered a cost-of-living adjustment that could be taken in a lump sum after making the move, a buy-out option on the employee's current mortgage and assistance with the employee's new mortgage. In the alternative, those salaried professional employees who elected not to transfer were eligible for a special severance package equal to one month's salary for each year of service with Seagram."

(Res. A-4 to A-5).

Petitioner, who was 55 years old at the time, elected to retire with an early retirement pension and related medical benefits under the Company's pension plan. In addition, in accordance with the special severance plan offered in connection with the move, Petitioner received a severance payment equal to 21-1/2 months of salary. (Res. A-6; R. 173: Stipulation of Facts and Admissibility of Exhibits).

With regard to Petitioner's distortions concerning his "over 21 years" employment by Seagram (Pet. at 1), the District Court found as follows:

> "During his career at Seagram, Dr. Coleman received 25 salary and adjustment increases, resulting in a salary of $52,620 at the time of his retirement in August 1985. . . . Dr. Coleman's 1985 salary was the second highest among the employees at his level (Senior Research Scientist—Grade 18) in the R&D department.
>
> * * * *
>
> His ratings ranged from just below a 3 (or "Good") rating, given when an employee performed "as expected," to a rating of 4 (or "Superior"), given when an employee's performance exceeded expectations. Dr. Coleman's evaluations included written comments that he needed to complete projects in a more timely manner, reduce his backlog of projects, improve his personal

> relationship with personnel at the production plant, and focus more on creative projects and less on routine work."

(Res. A-3).[3]

With regard to Petitioner's claim that he should have been offered a Section Head position in advance of the Department's move from Louisville to White Plains (Pet. at 1-2), the District Court found as follows:

> "Dr. Coleman failed to establish, however, that he was considered and rejected for the Section Head position. . . . Dr. Weber remained in and performed the duties of his position until August 1985. . . . [T]here is no evidence that any meetings or deliberations took place regarding candidates for the position prior to the move.
>
> * * * *
>
> Seagram's proffered justification for waiting until after the move to White Plains before making a decision regarding the Section Head position is that it was waiting until management knew for certain which personnel, qualified for the position, from the Louisville R&D facility would be transferring to White Plains. The evidence offered by plaintiff fails to persuade the court that this justification is merely a pretext for intentional racial discrimination. It would have made little sense in early 1985 for Seagram to expend the time and resources necessary to select a new Section Head. . . . More

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[3] With regard to Petitioner's contention that he was a "long-time activist in the civil rights movement" (Pet. at 1), the District Court found that:

> "Seagram had in the past strongly supported Dr. Coleman's NAACP activities by providing paid time off to attend NAACP meetings and providing hospitality for the Louisville delegates at the National Convention. . . . Dr. Coleman's participation in NAACP activities took place primarily in the late 1970s."

(Res. A-15).

> specifically, Dr. Coleman's vacillation gave Seagram grounds for pause in making the promotion decision."

(Res. A-11 to A-13).[4]

As to Petitioner's reference to his own testimony concerning what he was allegedly told by Dr. Frederick Weber, his Section Head, (Pet. at 2), these allegations were directly contradicted by the trial testimony of Dr. Weber and James Martin, which the District Court stated carried "great weight with the court." (Res. A-8).

> "Dr. Weber, however, denied that Dr. Bluhm made racist remarks about Coleman. Dr. Weber did criticize Dr. Bluhm's management style. . . . But Dr. Weber made it clear that race was not a factor in the employment actions taken by Dr. Bluhm. He never heard Dr. Bluhm make a racist statement, nor did he observe him make a decision based on race. It was also Dr. Weber's firm understanding that a decision on the new Section Head would not be made until after the move to White Plains.[5]

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[4] With regard to Petitioner's claim that "an employee with a high school diploma assumed the job responsibilities previously performed by Dr. Weber" (Pet. at 3), the District Court found that:

> "Dr. Weber retired on August 1, 1985. Thereafter, Mr. Jose Puebla, a Junior Scientist, performed some of the responsibilities of a Section Head, but primarily worked to pack away laboratory equipment in preparation for the move to White Plains. . . .When none of the senior staff from the Biotechnology Section elected to make the move, Dr. Bronsky was appointed to the Section Head position on an interim basis. He remained in that position until February 1989 when Seagram appointed Dr. William Hirt to the Section Head position."

(Res. A-6).

[5] As to Petitioner's claim that he saw racist comments in a job-performance evaluation (Pet. at 2), the only specific race-related commentary in the evaluation process to which petitioner has ever pointed is in the Supervisor's Notes, prepared by Dr. Weber, which state that Coleman had "some sensitivity to racial issues." (Plaintiff's Exh. 19-18).

> Mr. James Martin, African-American male, is the Director of Management Services at Seagram's White Plains facility. . . . Like Dr. Coleman, while in Louisville he had been involved in organizations and activities protected by Title VII. . . . Mr. Martin stated that race was never an issue with Dr. Bluhm, and his sole concern was professional performance. Mr. Martin also stated that it was clear to him that a decision on the new Section Head would not be made until the move to White Plains. Mr. Martin never believed that race was a factor in Seagram's actions in regard to Dr. Coleman."

(Res. A-7 to A-9).

Finally, the District Court found as follows with regard to the request Petitioner made for his personnel file while he was still employed by Seagram (Pet. at 2):

> "On or about March 15, 1985 Dr. Coleman requested his personnel file from Dr. Weber. The informal supervisor's file relating to his employment was shown to him, but Dr. Coleman stated that the file was incomplete. . . . Dr. Bluhm brought Dr. Coleman's personnel file from the Human Resources department in New York City for Dr. Coleman to review. Nonetheless, Dr. Coleman wrote . . . to M. W. Griffin, Executive Vice President for Human Resources, requesting additional documents in his file. Mr. Griffin responded that he believed Dr. Coleman had been provided with everything in his personnel file, and that if he was seeking other documents, he needed to identify them specifically. . . . Dr. Coleman responded by stating the types of documents he was seeking. Dr. Coleman was then told that Seagram did not have the documents he requested."

(Res. A-5).[6]

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[6] As to Petitioner's reference to an Equal Employment Opportunity Commission ("EEOC") "letter of right to sue" (Pet. at 3), the District Court found that:

(*footnote continued*)

REASONS FOR DENYING THE PETITION

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ITS RULINGS ON PETITIONER'S DISCOVERY-RELATED MOTIONS.

Based on its review of the record, the Court of Appeals found as follows with regard to Petitioner's discovery-related claims:

> "Although Seagram produced 3000 pages of employment records of Coleman and other employees, Coleman remained convinced that Seagram was withholding records, and filed a number of motions to compel. The district court ultimately determined that Seagram had complied fully with Coleman's discovery requests. . . .
>
> [W]e find no abuse of discretion in the district court's rulings on discovery or in the denial of the motion to amend the complaint. *See Plott v. General Motors Corp., Packard Elec. Div.*, 71 F.3d 1190, 1196 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 1546 (1996); *Semco, Inc. v. Amcast, Inc.*, 52 F.3d 108, 114 (6th Cir. 1995)."

(Pet. A-6 at 2-3, 4).

The District Court's discovery rulings are reviewed under an abuse of discretion standard. *Wayte v. United States*, 470 U.S. 598, 624-25 (1985) (Marshall, J., dissenting) ("District Court decisions on discovery are . . . not subject to plenary review on appeal, but instead are reviewed under an abuse-of-discretion standard.") Similarly, a related motion to compel or for sanctions for alleged failure to comply is also reviewed

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> "On September 11, 1985 Dr. Coleman filed a Complaint of Discrimination asserting essentially the same claims that are the subject of the present action. . . . After conducting its own investigation, . . . the EEOC issued its determination that there was not probable cause to believe that Dr. Coleman's allegations were true."

(Res. A-6).

for abuse of discretion. *See, e.g., Harris v. Chipman*, 97 F.3d 499, 506 (11th Cir. 1996); *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc.*, 43 F.3d 922, 929 (4th Cir. 1995); *Herring v. Delta Air Lines, Inc.*, 894 F.2d 1020, 1021 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990). Finally, as stated by the Sixth Circuit in *Plott v. General Motors Corp., Packard Elec. Div.*, 71 F.3d 1190 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 1546 (1996), the relevant factors applicable to the review of discovery orders include: (i) when the appellant learned of the issue; (ii) whether the desired discovery would have changed the rulings; (iii) how long discovery lasted; (iv) whether the appellant was dilatory in his discovery efforts, and (v) the responsiveness of the appellee to discovery requests. *Id.* at 1196-97.

The record below is clear that the District Court did not limit Petitioner's scope of discovery, nor did Seagram request such a limitation. Rather, during the nine-year course of this litigation—and more than six years of discovery—Seagram produced over 3,000 pages of documents, including personnel and personnel policy documents related to Petitioner's employment with Seagram and the personnel files of other employees in the R&D Department whose files were requested by Petitioner; responded to multiple interrogatories and a request for admissions regarding the produced documents; and produced four managers and former managers for depositions by Petitioner's counsel.[7]

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[7] (R. 49, 55: Deposition of Frederick Weber taken on October 1, 1991 and October 10, 1991; R. 126: Deposition of José Puebla taken on September 15, 1989; R. 127, 130, 132: Deposition of Leslie Bluhm taken on May 10, 1989, September 12, 1989, and September 14, 1989; R. 128-29: Deposition of Robert Cherundolo taken on September 13, 1989 and September 14, 1989; R. 131, 133-35: Deposition of Albert Bronsky taken on May 12, 1989 and September 11, 1989). More specifically, in response to Plaintiff's First Set of Document Requests, served in June 1988, Seagram gathered and forwarded to Plaintiff all performance and employment documents regarding Plaintiff after completing a diligent search of Company records. (R.12: Responses and Objections by Defendant to

In addition, in response to Petitioner's three Motions to Compel, Seagram submitted affidavits of its in-house counsel and outside counsel swearing to Seagram's good faith search for, and production of, all of the requested documents which it had in its possession or control. *See* Affidavit of Ann Giambusso, sworn to on September 15, 1993 (attached at Appendix A-18). Finally, contrary to the Petitioner's repeated claim to the contrary, the District Court directed Seagram, in response to Petitioner's First and Second Motions To Compel, to produce any documents not already produced and, in addition, directed Seagram to produce for inspection the personnel files of current and former Seagram employees, copies of

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Plaintiff's Interrogatories and Responses and Objections to Plaintiff's Request for the Production of Documents). In connection with Plaintiff's deposition of two of Defendant's employees, Dr. Leslie Bluhm and Mr. Robert Cherundolo, in 1989 Defendant produced additional documents, including documents describing Defendant's policies and procedures concerning employee evaluations and merit reviews in effect during Plaintiff's employment with the Company. On September 19, 1990, Plaintiff filed the first of his three Motions to Compel the production of documents that he believed should be in Seagram's files. (R. 31: Motion by Plaintiff to Compel Discovery). On April 11, 1991, Plaintiff served his Second Set of Interrogatories and Request for Production of Documents in response to which Defendant produced an additional 1,887 pages of documents. On April 19, 1992, Plaintiff filed a Motion to Propound in Excess of Thirty Requests for Admissions. (R. 57: Plaintiff's Motion to Propound Requests for Admissions in Excess of 30). On January 30, 1993, Plaintiff served his Second Motion to Compel Discovery. (R. 76: Motion by Plaintiff to Compel). By an Order dated February 3, 1993, Plaintiff's Motion to Propound in Excess of Thirty Admissions was granted and Seagram's Motion to Terminate Discovery was denied. (Pet. A-3). On April 26, 1993, Plaintiff served a Third Motion to Compel and a Motion to Propound In Excess of Thirty Interrogatories and Request for Production of Documents. (R.93: Third Motion by Plaintiff to Compel Discovery). By Order dated June 11, 1993, the Magistrate Judge directed Defendant to produce for inspection the personnel records of certain listed former and current Seagram employees, in response to which Defendant uncovered no additional documents in its fourth search of Company facilities, but nevertheless again produced all documents responsive to the Order. (Pet. A-4).

which had already been produced to Petitioner. (Pet. A-4). Only after Seagram's compliance with this order did the court deny Petitioner's motion to impose sanctions on the Defendant, because"[a] review of the record convinces this Court that the defendant has made every effort to comply with Coleman's discovery requests and as such, sanctions [are] inappropriate."[8] (Pet. A-5 at 2).

In addition, while Petitioner is correct in stating that it was Seagram's policy to conduct an annual evaluation of each employee on Seagram's performance evaluation form (the "Blue Book") to be maintained in Seagram's official personnel files in New York City, Dr. Weber testified at trial, in response to a question of whether he prepared a "Blue Book" on every employee every year, that he only did that "when we were forced into it." (R. 179: Transcript of trial testimony, May 31, 1995, at 61). Dr. Weber also testified that he did not fill out the sections of the "Blue Book" concerning promotability for Petitioner or for any other employees, and that he usually did not fill out a complete "Blue Book" on anybody while he was Section Head. (R. 179: Transcript of trial testimony, May 31, 1995, at 69). Indeed, an Exhibit prepared by Petitioner indicates that the official personnel files of all of the employees who worked in the Louisville R&D Department are deficient in that they do not have performance reviews for each year of the employee's tenure and, in the case of a number of employees, do not include any "Blue Book" reviews at all. (Defendant's Exh. 58).

Finally, Petitioner is in error when he states that the District Court did not allow him to discover certain of Seagram's per-

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[8] In fact, the only discovery motions brought by Petitioner that were denied by the District Court were a Motion for Ruling on Discovery Omissions (which the court found sought a ruling on certain aspects of a previously filed Motion to Compel) and a Motion for Leave to Propound in Excess of 30 Interrogatories made after Defendant had already responded to Plaintiff's First and Second Set of Interrogatories. (Pet. A-5 at 1-2).

sonnel policies and procedures. (Pet. at 18-19). Rather, Seagram produced the requested policy and procedural documents it had in its possession and control in connection with Petitioner's deposition of two of Defendant's managers. (*See* fn. 7, *supra*). Also, Seagram's counsel swore in Affidavits submitted in response to Coleman's Motions to Compel that Seagram did not have a separate Personnel Manual in effect after 1983, and that a thorough search for other requested personnel policy documents had been undertaken and that no further documents had been found. (Res. A-20 at ¶ 7).[9]

While Petitioner claims that all of the foregoing and the District Court's ultimate conclusion that Seagram had made every effort to comply by producing those documents which were within its possession and control, is unsatisfactory, and does not support the Court of Appeal's conclusion that "the District Court ultimately determined that Seagram had complied fully with [Petitioner's] discovery requests" or its finding "no abuse of discretion in the district court's rulings on discovery" (Pet. at 14-16), the Court of Appeals was clearly correct in this regard. The District Court ultimately determined that Seagram had been responsive in both its search for documents which could have existed and its production of all documents under its possession and control, and that, therefore, Seagram had complied fully with the discovery requests

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[9] Plaintiff's reference to "redacting discoverable job-related documents" (Pet. at 17-18) refers to documents describing a research project which was produced to Petitioner as part of the additional employee personnel files Petitioner had requested. (Plaintiff's Exh. 44). The redacted portions of this document contain confidential business, not personnel, information and neither Petitioner nor his counsel ever made a specific request for unredacted copies of that document. Similarly, despite Petitioner's reference to an alleged withholding of his "promotability evaluations under a scheme of 'privilege documents' " (Pet. at 11), the only document withheld by Seagram on the grounds of privilege during the entire discovery process was an early draft of Seagram's response to the EEOC in connection with Petitioner's Charge, which had been inadvertently filed with Petitioner's personnel documents. (Res. A-20 at ¶ 5).

and was not subject to sanctions by the Court to compel production of what it did not have.[10]

II. PETITIONER'S CLAIMS REGARDING HIS MOTION TO AMEND HIS COMPLAINT TO ADD A STATE LAW CLAIM FOR EMOTIONAL AND MENTAL DAMAGES, AND HIS MOTION TO RECONSIDER HIS CONSTRUCTIVE DISCHARGE CLAIM, HAVE BEEN MADE MOOT BY THE FINDINGS OF THE DISTRICT COURT, AFFIRMED BY THE COURT OF APPEALS, THAT SEAGRAM DID NOT INTENTIONALLY DISCRIMINATE OR RETALIATE AGAINST PETITIONER ON THE BASIS OF HIS RACE.

Petitioner's claims in his Petition regarding his alleged constructive discharge and his motion to amend his complaint more than five (5) years after the commencement of his lawsuit to add a claim for emotional and mental injuries pursuant to the Kentucky Civil Rights Act (Pet. at 19-28) are directly related to, and dependent upon, his unfounded allegations regarding the District Court's discovery rulings which the Court of Appeals properly found were not an abuse of discretion by the lower court. However, these claims are also made moot by the District Court's holdings following a trial on the merits that Petitioner had not demonstrated that he suffered intentional racial discrimination or retaliation, which holdings Petitioner does not substantively contest in his Petition.[11]

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[10] There is no support in the record for Petitioner's claim of "exception [sic] public interest in the civil-rights community" for his discovery claims. (Pet. at 28).

[11] Petitioner's claim that the courts below did not address his claims of discrimination concerning job performance standards (Pet. at 27-28) is similarly deficient. In addition to holding that "based on the evidence of record, plaintiff has not persuaded the court that he suffered intentional discrimination" (Res. A-8), the District Court expressly found that:

(*footnote continued*)

As stated by the 6th Circuit in *Lynch v. Freeman*, 817 F.2d 380, 385 (6th Cir. 1987), "[a] determination of constructive discharge necessarily rests on a finding of discriminatory intent. The district court found no such intent and this finding is not clearly erroneous." *Id.* at 385. Furthermore, in addition to finding a lack of proof of intentional discrimination or retaliation, the District Court made specific findings of fact that Seagram encouraged all of its professional employees in the Louisville R&D department, including Petitioner, to move with the department to White Plains and guaranteed those employees positions with comparable responsibilities, grade level, and salary. The District Court also specifically found that Seagram's decision to wait until after the move to White Plains before making a decision regarding the selection of a new Section Head was both understandable and reasonable under the circumstances. (Res. A-12 to A-13). These are clearly not circumstances where a finding of constructive discharge would be appropriate, even where there had been a finding of intentional discrimination not present here. *See, e.g., Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 515 (6th Cir. 1991) (finding that the offer to an employee of other legitimate options within the company for continued employment "precludes a finding that [he] was constructively discharged."); *Darnell v. Campbell Cty. Fiscal Court*, 731 F. Supp. 1309, 1313 (E.D.Ky. 1990), *aff'd*, 924 F.2d 1057 (6th

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> "Dr. Coleman failed to establish that Seagram took an employment action adverse to him. The only conduct of Seagram that is actionable is that which falls within the 300-day window prior to the filing of the complaint with the EEOC. The only conduct of Seagram falling within that period relates to its failure to promote Dr. Coleman to the Section Head position. As noted above, Seagram did not make a final determination regarding who would permanently fill the Biotechnology Section Head position until after the move to White Plains had been completed. Nor did the actions of Seagram or Bluhm constitute any sort of de facto rejection of his application."

(Res. A-14).

Cir. 1991). In addition, the finding by the District Court that Petitioner has not proven intentional discrimination or retaliation makes the subject of what, if any, remedies (*e.g.*, emotional and mental damages) Petitioner might have been entitled to as a result of such discrimination moot.

Furthermore, even if Petitioner's appeal of the denial of his motion to amend were not moot, the Court of Appeals found "no abuse of discretion in the district court's . . . denial of the motion to amend the complaint." (Pet. A-6 at 4). *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-31 (1971); *Semco, Inc. v. Amcast, Inc.*, 52 F.3d 108, 114 (6th Cir. 1995).

In evaluating the appropriateness of a motion to amend, the court may consider undue delay of filing, lack of notice to the opposing party, bad faith by the moving party, undue prejudice to the opposing party, and futility of amendment. *See Foman v. Davis*, 371 U.S. 178-182 (1962); *General Elec. Co. v. Sargent & Lundy*, 916 F.2d 1119, 1130 (6th Cir. 1990). In denying the Petitioner's Motion to Amend, the Magistrate Judge noted that Petitioner offered "no explanation for this extraordinary delay" and that "the amended complaint does not contain any factual allegations that were not known to the Plaintiff when the original complaint was filed in 1987." (Pet. A-3 at 2-3). The Magistrate Judge also found that Seagram would be unduly prejudiced because, at this late date, it would be required to re-depose a plaintiff who was claiming discrimination several years previously, as well as other witnesses whose memories concerning the Petitioner's demeanor "would now be long faded . . . ." (*Id.* at 5). Accordingly, the Magistrate Judge concluded that not only was Petitioner's delay unjustified, it unfairly prejudiced the defendant." (*Id.* at 4-5).

Thus, as stated by the Magistrate Judge in his Order denying Petitioner's Motion to Amend—and in his Order denying Petitioner's Motion for Reconsideration related, *inter alia*, to

his claims regarding document discovery[12] (Pet. A-4 at 1-3)—substantial prejudice to Seagram, undue delay, lack of notice and bad faith by Petitioner all militated against permitting Petitioner to amend his five year old complaint to add a time-barred claim for emotional and mental damages, which was particularly within the control of the Petitioner. Therefore, the Orders of the Magistrate Judge denying Petitioner's Motion to Amend did not constitute an abuse of discretion.

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[12] The Petitioner again contends in his Petition that discovery of further documents was necessary before he could file a motion to amend his complaint to add a claim for emotional and mental damages (Pet. at 21-22), despite the fact that he had not seen those documents. (*See* Pet. A-4 at 3; fn. 5, *supra*).

CONCLUSION

It is submitted for all of the reasons set forth herein that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

Civil Action No. 87-0022-L(R)
Filed: June 29, 1995

JAMES W. COLEMAN, PH.D.,

Plaintiff,

—v.—

JOSEPH E. SEAGRAM & SONS, INC.

Defendant.

MEMORANDUM OPINION

This is a racial discrimination case filed under Title VII. A bench trial was held on May 30 and 31, 1995. For the reasons that follow, the court concludes that judgment must be entered for the defendant.

FINDINGS OF FACT

Prior to commencing work for Defendant Joseph E. Seagram & Sons, Inc. ("Seagram"), Plaintiff James W. Coleman ("Dr. Coleman"), an African-American, had attained both

a bachelor's degree from Tougaloo College and a master's degree from Tuskegee Institute. Dr. Coleman had worked as a bacteriological technician for the Air Force and as an instructor at Tuskegee Institute. Dr. Coleman was first hired by Seagram in September 1964. He was initially paid an hourly wage as a Production Trainee at Seagram's Lawrenceburg, Indiana production facility. Dr. Coleman continued to work there as Yeast Chemist until September 7, 1965.

Dr. Coleman then began working at Seagram's Research and Development ("R&D") facility in Louisville, Kentucky. Still working for an hourly wage, Dr. Coleman worked in the Biotechnology Section. Dr. Coleman worked at the Louisville R&D facility for the remainder of his career with Seagram, and received a number of promotions. In September 1965 he was promoted to Central Research Supervisor, a wage position. Dr. Coleman was then promoted to a salaried position as an Associate Scientist in November 1966. In December 1967 Dr. Coleman began work as a Senior Associate Scientist. He remained in that position until January 1973, when he was made a Research Scientist. In January 1977 he was promoted to Senior Research Scientist, a position he held until the end of his career with Seagram in August 1985. The position above Senior Research Scientist, the highest position in the Biotechnology Section, was the Section Head position.

Dr. Coleman received his Ph.D. in Microbiology from the University of Louisville in 1972. Seagram fully reimbursed Dr. Coleman for his tuition and periodically afforded him paid time off to enable him to complete his thesis on a subject related to his work for Seagram. Dr. Coleman's articles on the subject of grain alcohol fermentation have been published in scientific journals. Dr. Coleman also holds memberships in various scientific organizations, and has taught at the University of Louisville.

Dr. Coleman was actively involved with the activities of the NAACP throughout most of his career at Seagram. His participation was a matter of general knowledge at the Louisville R&D facility. Dr. Coleman took paid time off to attend NAACP national conventions in the mid-1970s, and Seagram

authorized Dr. Coleman to provide hospitality to the Louisville delegation at certain of the conventions.

Dr. Albert Bronsky was the Section Head of the Biotechnology Section from 1968 to 1975, and was thus Dr. Coleman's immediate superior, advised Dr. Coleman that he needed to receive a series of superior ratings in order to get promoted. On December 22, 1976 Dr. Coleman sent a letter to Dr. S.L. Adams to Seagram's offices in New York. This letter requested a review of Dr. Bronsky's determination that Dr. Coleman's performance did not warrant a promotion to Senior Research Scientist. Dr. Coleman's actions were effective, and he received that promotion as of January 1977.

During his career at Seagram, Dr. Coleman received 25 salary and adjustment increases, resulting in a salary of $52,620 at the time of his retirement in August 1985. These increases came at intervals of approximately one year. Dr. Coleman's 1985 salary was the second highest among the employees at his level (Senior Research Scientist–Grade 18) in the R&D department, but was less than that of employees at higher level managerial positions. As a basis for comparison, as Section Head (Grade 21) Dr. Weber's 1985 salary was $57,060. Two other Senior Research Scientists, Dr. Welden Maisch and Dr. Ping Wang, were paid $48,180 and $44,700 respectively.

Dr. Coleman's salary increases were based in part on performance evaluations and merit reviews given during his last ten years of employment with Seagram. His ratings ranged from just below a 3 (or "Good") rating, given when an employee performed "as expected," to a rating of 4 (or "Superior"), given when an employee's performance exceeded expectations. Dr. Coleman's evaluations included written comments that he needed to complete projects in a more timely manner, reduce his backlog of projects, improve his personal relationship with personnel at the production plant, and focus more on creative projects and less on routine work.

Dr. Fred Weber was Section Head for the Biotechnology Section from March 1975 until his retirement in August 1985. Dr. Weber, the other Section Heads at the R&D facility, and

Mr. James Martin as Research Administrator, reported to the Vice President for Research and Development, Dr. Leslie Bluhm. In December 1982 Seagram discontinued its bottling operations at the Louisville plant, and closed the production facility in the Spring of 1983. Then in early 1984 Dr. Weber made it known that the would retire when he became 62 years of age in February 1985. Dr. Coleman's interest in the position was either generally known to Seagram management or made known to them by his expression of interest.

In the latter part of 1984, Seagram announced that the R&D Department would be relocating to its facility in White Plains, New York and consolidated with Seagram's New Products Development operation that had been located in Hawthorne, New York. Dr. Weber indicated that he would not be transferring to White Plains, and elected to retire in August 1985.

Seagram offered all salaried professional employees in Louisville, including Dr. Coleman, the opportunity to transfer to the White Plains facility. Those making the move to White Plains would work there in a position comparable to their previous position in Louisville, with comparable responsibilities, grade level, and salary. Seagram did not offer individual employees promotions as an inducement to get them to move to White Plains. Certain employees did, however, receive promotions either in the ordinary course of Seagram's promotion process or as a reward for extraordinary achievement. For example, in November 1984 Mr. Hugh Mason was promoted to Research Engineer and in February 1985 Ms. Althea Jones was promoted to Junior Scientist. Ms. Jones' promotion came after she received a highly favorable letter regarding her work on a special project, and was requested by her so that she would be able to make the move to White Plains.

Seagram offered relocation allowances and assistance in finding homes in the White Plains area. Seagram paid for employees to take trips to New York to locate a new home, offered a cost-of-living adjustment that could be taken in a lump sum after making the move, a buy-out option on the employee's current mortgage and assistance with the employee's new mortgage. In the alternative, those salaried

professional employees who elected not to transfer were eligible for a special several package equal to one month's salary for each year of service with Seagram. This option was no longer available after an employee moved to the White Plains facility.

A letter dated March 14, 1985 was sent to Dr. Coleman and other professional employees urging them to transfer to White Plains, and requesting that their intentions be indicated to Dr. Bluhm or James Martin by March 22, 1985. Of the employees in the Biotechnology Section, only Althea Jones, Jose Puebla, and James Ervin, all Junior Scientists, transferred to White Plains. On or about March 15, 1985 Dr. Coleman requested his personnel file from Dr. Weber. The informal supervisor's file relating to his employment was shown to him, but Dr. Coleman stated that the file was incomplete. In May 1985 Dr. Bluhm brought Dr. Coleman's personnel file from the Human Resources department in New York City for Dr. Coleman to review. Nonetheless, Dr. Coleman wrote a letter dated May 31, 1985 to M. W. Griffin, Executive Vice President for Human Resources, requesting additional documents in his file. Mr. Griffin responded that he believed Dr. Coleman had been provided with everything in his personnel file, and that if he was seeking other documents, he needed to identify them specifically. On June 20, 1985 Dr. Coleman responded by stating the types of documents he was seeking. Dr. Coleman was then told that Seagram did not have the documents he requested.

On March 22, 1985, in response to an oral question to him by Mr. Martin, Dr. Coleman stated that he would be transferring to White Plains. It was brought to his attention at some point later in the day that, under Seagram's move incentive program, an employee who accepted the move incentives but later chose not to transfer to White Plains would not be eligible for the special severance package. Interested in preserving his right to elect to receive the severance package, Dr. Coleman sent a handwritten letter dated March 22, 1985 to Dr. Bluhm and Mr. Martin stating that would not be transferring to the White Plains facility. Dr. Coleman's decision

was also apparently based on his desire to see more information from his personnel file in order to gauge the likelihood that would be promoted to the Section Head position, either before or after the move to White Plains was completed. Dr. Coleman also considered the personal and financial aspects of relocating to White Plains, New York. By 1985, Dr. Coleman had lived in Louisville for approximately 25 years, and his wife had developed a successful career as a real estate broker. The Colemans also owned four fourplexes comprising 16 rental units.

Dr. Weber retired on August 1, 1985. Thereafter Mr. Jose Puebla, a Junior Scientist, performed some of the responsibilities of a Section Head, but primarily worked to pack away laboratory equipment in preparation for the move to White Plains. Seagram did not make a decision regarding who would fill the Biotechnology Section Head position on a permanent basis until it was clear which employees would transfer to the White Plains facility. When none of the senior staff from the Biotechnology Section elected to make the move, Dr. Bronsky was appointed to the Section Head position on an interim basis. He remained in that position until February 1989 when Seagram appointed Dr. William Hirt to the Section Head position.

On August 19, 1985, Dr. Coleman submitted a letter to Dr. Bluhm stating that he would separate from Seagram effective August 31, 1985. In accordance with the special severance package offered in connection with the move to White Plains, Dr. Coleman received payments equal to $21\frac{1}{2}$ months of salary, and continued coverage under the Seagram Group Insurance Program. On September 11, 1985 Dr. Coleman filed a Complaint of Discrimination asserting the same claims that are the subject of the present action. On December 19, 1985 this Complaint was directed to the federal Equal Employment Opportunity Commission ("EEOC"). After conducting its own investigation, on October 10, 1986 the EEOC issued its determination that there was not probable cause to believe that Dr. Coleman's allegations were true.

At trial Dr. Coleman testified that part of his personnel file contained racist comments. He stated that Dr. Weber had told him that Dr. Bluhm had made racist comments in his evaluations. He further testified that Dr. Weber had told him that the Dr. Bluhm had forced him to put negative comments in Dr. Coleman's personnel file. Dr. Coleman also indicated that Dr. Weber told him that Dr. Bluhm had made racist comments about Dr. Coleman and that Dr. Coleman would not get the job of Section Head. He was also displeased that Seagram had taken his picture and used it without his permission for articles appearing in The Louisville Defender newspaper, Ebony magazine, and minority recruitment literature for Seagram. Dr. Coleman complained to management staff at Seagram that he was offended by this activity. Dr. Weber was Dr. Coleman's supervisor during Dr. Coleman's entire career at Seagram. Dr. Weber, however, denied that Dr. Bluhm had made racist remarks about Coleman. Dr. Weber did criticize Dr. Bluhm's management style, but did not feel that Dr. Bluhm made employment decisions on the basis of race.

Mr. James Martin, an African-American male, is the Director of Management Services in White Plains. He previously worked in the Louisville production facility and then transferred to R&D in 1983. Currently he is involved with Associated Managers, an association of African-American employees at Seagram whose purpose is to act as an advocate for African-American recruitment, promotion, and training.

Mr. Martin stated that the Louisville employees were informed that no decisions regarding promotions would be made until the move to White Plains was completed. Mr. Martin believes that Dr. Coleman and Dr. Bluhm had a conflict. Mr. Martin saw no evidence that the conflict concerned race. In Mr. Martin's opinion, race was never an issue with Dr. Bluhm. Dr. Bluhm was primarily concerned with professional qualifications and performance.

CONCLUSIONS OF LAW

This is a racial discrimination case arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

(1992). This court has jurisdiction under the general federal question statute, 28 U.S.C. § 1331 (1992).

This case poses a dilemma. The court is faced with a well-educated and articulate plaintiff whom in good faith believes that because of his race he has suffered job-relation discrimination. Dr. Coleman was obviously well qualified for the Section Head position. However, the court must judge the case on the evidence presented. Based on the evidence of record, plaintiff has not persuaded the court that he suffered intentional discrimination. *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742, 2749-54, 125 KL.Ed.2d407 (1993). This conclusion is not critical of the credibility of the plaintiff.

The testimony of Dr. Fred Weber and Mr. James Martin offers a different perspective and carries great weight with the court. Dr. Fred Weber, a Caucasian male, retired as Section Head of Biotechnology in 1985. He had worked with Dr. Coleman during his entire tenure at Seagram. As the time of trial he had been retired for 10 years and had no real ties or allegiance to Seagram. He was critical as he was supportive of some of the management decision at Seagram. He stated things changed at Seagram when Dr. Bluhm became his immediate supervisor. Dr. Bluhm was a poor manager of people. Dr. Bluhm had a tendency to yell and criticize rather than counsel. Dr. Weber had many criticisms of Dr. Bluhm's management style and felt that Dr. Bluhm had a difficult and caustic personality. But Dr. Weber made it clear that race was not a factor in the employment actions taken by Dr. Bluhm. He never heard Dr. Bluhm make a racist statement, nor did he observe him make a decision based on race. It was also Dr. Weber's firm understanding that a decision on the new Section Head would not be made until after the move to White Plains.

Mr. James Martin, African-American male, is the Director of Management Services at Seagram's White Plains facility. He had previously worked in Louisville, first with the production facility and thereafter in R&D in 1983. Like Dr. Coleman, while in Louisville he had been involved in organizations and activities protected by Title VII. He is cur-

rently the president of Associated Managers, an organization of African-American managers employed at Seagram which works as an advocacy group to ensure fair promotion and training opportunities and practices for African-Americans at Seagram. Mr. Martin was aware that tension existed between Dr. Coleman and Dr. Bluhm and that it seemed to involve the issue of promotional opportunities. Mr. Martin stated that race was never an issue with Dr. Bluhm, and his sole concern was professional performance. Mr. Martin also stated that it was clear to him that a decision on the new Section Head would not be made until the move to White Plains. Mr. Martin never believed that race was a factor in Seagram's actions in regard to Dr. Coleman. Like the court, Mr. Martin did not question Dr. Coleman's good faith belief that race had adversely influenced employment decisions regarding Dr. Coleman. However, Mr. Martin saw no objective evidence to support Dr. Coleman's belief.

The facts of his case do not present the kind of "continuing violation" necessary to toll the statute of limitations. Nevertheless, conduct occurring outside the 300-day limitations period imposed by Title VII, while not actionable itself, "may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue." *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977). Such evidence was admitted for the purpose of determining whether otherwise apparently race-neutral actions were, in fact, motivated by racial animus. As plaintiff's motion for reconsideration of the court's prior order granting summary judgment for defendant on plaintiff's claim for constructive discharge was denied from the bench, only claims for retaliatory discrimination and failure to promote remain.

Title VII provides, in pertinent part:

§ 2000e-2. Unlawful employment practices.

(a) It shall be an unlawful employment practice for an employer

> (1) to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . .

A. FAILURE TO PROMOTE

In a Title VII case, the plaintiff bears the initial burden of establishing a prima facie case by a preponderance of the evidence. *Ang v. Procter & Gamble Co.*, 932 F.2d 540, 548 (6th Cir. 1991). When asserting that the employer failed to promote the plaintiff based, at least in part, by impermissible considerations of race, the plaintiff's prima facie case requires a demonstration that 1) he is a member of protected class, 2) he was qualified and applied for the promotion, 3) he was considered and rejected for the promotion, and 4) after his rejection the position remained open and the employer continued to seek applicants from persons with qualifications similar to that of plaintiff. *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973); *Jackson v. RKO Bottlers of Toledo, Inc.*, 743 F.2d 370, 375 (6th Cir. 1984).

If the plaintiff carries this burden, it is then incumbent upon the defendant employer to articulate some legitimate, nondiscriminatory reason for the adverse employment determination. *McDonnell Douglas*, 411 U.S. at 802. Once the employer does so, the burden shifts back to the plaintiff to prove by a preponderance of the evidence that the legitimate reasons offered by the employer were not its true reasons, but were merely a pretext for discrimination. A reason cannot be a pretext unless it is shown both that the reason was false and that discrimination was the real reason for the employer's action. *Hicks*, 113 S.Ct. at 2749-54. The burden of persuasion that the plaintiff was the victim of intentional discrimination remains at all times with the plaintiff. *Texas Dep't of Community Affairs v. Burdine*, 540 U.S. 248, 253 (1981).

Dr. Coleman, an African-American, is a member of a protected class. Dr. Coleman was also well qualified for the Section Head position. He had extensive experience in the Biotechnology area, and had performed very well throughout

his career at Seagram. Had Dr. Coleman chosen to transfer to White Plains, he would have been the only Senior Research Scientist in Biotechnology to do so, and his experience and credentials would have established him as the front-runner for that position. The testimony of Dr. Weber and James Martin confirms the court's conclusion in this regard.

Dr. Coleman has also met his burden of demonstrating that he "applied" for the Section Head position. The practice at Seagram did not generally require a formal application from current Seagram employees for openings in salaried, professional positions. Where possible, Seagram's policy was to try and fill such openings by an internal search process, finding and promoting qualified applicants from within the company's current employees. Seagram employees periodically completed a form expressing their interest in certain positions should promotion opportunities arise. Rather than completing an application each time an opening arose, this form and word of mouth were used to determine who was interested in a new opening. Through this form, Seagram's own promotion procedures, and other expressions of interest by Dr. Coleman, it is clear that Dr. Coleman effectively applied for the Section Head opening created by Dr. Weber's retirement.

Dr. Coleman failed to establish, however, that he was considered and rejected for the Section Head position. While no doubt Seagram realized that it would need to fill the opening created by Dr. Weber's retirement, Dr. Weber remained in and performed the duties of his position until August 1985. Thereafter Dr. Bronsky acted as Biotechnology Section Head on an interim basis during the transition to White Plains and until a permanent replacement was found. Seagram may have considered Dr. Coleman a likely candidate for promotion to that position. But there is no evidence that any meetings for deliberations took place regarding candidates for the position prior to the move. In addition, no final decision regarding Dr. Weber's successor was made until well after the move to White Plains, when Dr. Hirt was placed in that position in 1989. There is no indication from the facts presented that Dr. Coleman was rejected as a viable candidate at any time before

he submitted his letter of resignation in August 1985. Dr. Coleman relies heavily on some negative statements made by Dr. Bluhm or Dr. Weber in his earlier performance evaluations to assert that Dr. Bluhm would have blocked his promotion in any event. Those statements, however, neither demonstrate any racial animus on the part of Dr. Bluhm toward Dr. Coleman nor are they sufficient to establish a de facto rejection of Dr. Coleman's application. The statements contain ordinary, business-related matters such as timely completion of projects, ability to deal effectively with subordinate employees and aggressive leadership ability. Furthermore, subsequent evaluations were more favorable to Dr. Coleman.

Dr. Coleman filed as an exhibit an advertisement by Seagram which Dr. Coleman took as a rejection. Dr. Coleman also stated he had seen another advertisement in a trade journal seeking applicants for the Section Head position, but he was unable to find it and thus was unable to produce it at trial. The advertisement he was able to present at trial does not constitute a rejection of Dr. Coleman for the position. Absent some more concrete act or evidence demonstrating that he had been rejected by Dr. Bluhm or Seagram management, Dr. Coleman has failed to prove that he was rejected by Seagram.

Even if the failure of Seagram to make a decision regarding the Section Head position until after the move were itself considered an "adverse employment decision" under the *McDonnel Douglas* analysis, Dr. Coleman would still fail to establish a violation of Title VII. Seagram did seem to fill the Section Head position after the move to White Plains, and considered applicants of Dr. Coleman's qualifications, thus satisfying the fourth element of the *McDonnell Douglas* analysis.

Seagram's proffered justification for waiting until after the move to White Plains before making a decision regarding the Section Head position is that it was waiting until management knew for certain which personnel, qualified for the position, from the Louisville R&D facility would be transferring to White Plains. The evidence offered by plaintiff fails to persuade the court that this justification is merely a pretext for intentional racial discrimination. It would have made little

sense in early 1985 for Seagram to expend the time and resources necessary to select a new Section Head, an upper level managerial position, if there was any significant risk that the person selected would not be working at the White Plains facility. The evidence strongly indicates that Seagram had difficulty in getting the senior staff, particularly in the Biotechnology Section, to make a decision regarding their plans to transfer. Most of these persons had strong ties to the Louisville area, were older and did not want to relocate at this point in their lives. Dr. Bluhm's letter of March 15, 1985 requesting an indication from eligible staff within two weeks came after the staff remained noncommittal more than six months after the initial announcement that the Louisville facility would be closed. Indeed, only three people in the Biotechnology Section elected to transfer, and all these were below the Senior Research Scientist and Research Scientist grade level. More specifically, Dr. Coleman's vacillation gave Seagram grounds for pause in making the promotion decision. On March 22, 1985 Dr. Coleman gave a verbal indication that he would transfer and a written indication that he would not. Given that his stated concern at the time was in protecting his right to take the special severance package, Seagram had legitimate reason to doubt whether Dr. Coleman would move to White Plains.

Because Dr. Coleman has both failed to demonstrate that Seagram rejected him for the Section Head position and failed to prove that the justifications offered by Seagram are mere pretexts for intentional racial discrimination, Dr. Coleman's claim for failure to promote must be dismissed.

B. RETALIATORY DISCRIMINATION

A claim for retaliation has the same sequence and burden of proof as an intentional discrimination case. *Zanders v. National R.R. Passenger Corp.*, 898 F.2d 1127, 1134 (6th Cir. 1990); *Smith v. City of Dayton*, 830 F.Supp. 1066, 1076 (S.D. Oh. 1993). The plaintiff must establish a prima facie case by showing that 1) plaintiff engaged in an activity protected by Title VII, 2) the exercise of his civil rights was known by the

defendant, 3) thereafter, the defendant took an employment action adverse to the plaintiff, and 4) there was a causal connection between the protected activity and the adverse employment action. *Christopher v. Strouder Memorial Hospital*, 936 F.2d 870, 877 (6th Cir.), *cert. denied*, ___ U.SA. ___, 112 S.Ct. 658, 116 L.Ed.2d 749 (1991). If the plaintiff proves these elements by a preponderance of the evidence, the defendant must then articulate a legitimate non-retaliatory justification for its action. If the defendant does so, the burden shifts back to the plaintiff to demonstrate by a preponderance of the evidence that the articulated justification was, in fact, merely a pretext for intentional retaliation. The burden of persuasion remains with the plaintiff at all times.

During his career at Seagram, Dr. Coleman actively participated in the activities of the NAACP at both the national and local levels. In addition, Dr. Coleman periodically spoke out on his own behalf and on the behalf of other African Americans at Seagram in an effort to ensure equal treatment for them in their compensation and terms and conditions of employment at Seagram. This activity is the kind of activity that Title VII was designed to protect. In addition, Seagram employees, both Dr. Coleman's peers and his superiors in managerial positions, were well aware of his involvement and activities. Dr. Coleman thus has satisfied the first two elements of his prima facie case.

However, Dr. Coleman failed to establish that Seagram took an employment action adverse to him. The only conduct of Seagram that is actionable is that which falls within the 300-day window prior to the filing of the complaint with the EEOC. The only conduct of Seagram falling within that period relates to its failure to promote Dr. Coleman to the Section Head position. As noted above, Seagram did not make a final determination regarding who would permanently fill the Biotechnology Section Head position until after the move to White Plains had been completed. Not did the actions of Seagram or Bluhm constitute any sort of de facto rejection of his application.

Likewise, Dr. Coleman failed to demonstrate any causal connection between adverse employment action and Dr. Cole-

man's participation in NAACP activities. And, as noted above, even assuming that Seagram's decision to delay filling the Section Head opening is itself actional under Title VII as an "adverse employment determination," the evidence does not support the conclusion that this decision was made as a way to retaliate against Dr. Coleman. First, Seagram had in the past strongly supported Dr. Coleman's NAACP activities by providing paid time off to attend NAACP meetings and providing hospitality for the Louisville delegates at the national convention. James Martin also testified that Seagram currently supports his activities to promote minority interests at Seagram. Second, Seagram's articulated justification for delaying that decision, to determine which Seagram employees for Louisville's R&D facility transfer to White Plains, support the conclusion that it was that consideration rather than a desire to retaliate against Dr. Coleman that caused the delay in making the promotion decision. Dr. Coleman has also failed to demonstrate that this articulated justification is just a pretext for discrimination. Finally, Dr. Coleman's participation in NAACP activities took place primarily in the late 1970s. The sheer passage of time renders it unlikely that an employment decision made in the mid-1980s was caused by Dr. Coleman's conduct so many years before. While not controlling, the "temporal link" between the protected activity and the adverse employment decision is strong evidence of whether a causal connection between the two exists. *Holland v. Jefferson National Life Insurance Co.*, 883 F.2d 1307, 1315 (7th Cir.); *Eastland v. Tennessee Valley Authority*, 704 F.2d 613, 627 (11th Cir. 1983).

Because Dr. Coleman has both failed to demonstrate that Seagram took adverse employment action against him and failed to prove that there was any causal connection between Seagram's conduct and protected activity, Dr. Coleman's claim for retaliatory discrimination must be dismissed. An appropriate order shall be entered.

This the 26th day of June, 1995.

/s/ THOMAS B. RUSSELL
Judge, U.S. District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

Civil Action No. 87-0022-L(R)
Filed: June 27, 1995

JAMES W. COLEMAN, Ph.D.,

Plaintiff,

—v.—

JOSEPH E. SEAGRAM & SONS, INC.

Defendant.

ORDER

This matter having come before the Court for trial on May 30 and 31, 1995; and the Court having considered the deposition testimony of Dr. Carl Bluhm and Dr. Richard Bronsky, who were unavailable to testify at trial, and all of the admissible evidence presented at trial; and the Court being otherwise sufficiently advised;

IT IS ORDERED that JUDGMENT be entered in favor of the Defendant and against the Plaintiff, and this case is DISMISSED with prejudice.

This is a final and appealable order.
This the 26th day of June, 1995.

/s/ THOMAS B. RUSSELL
Judge, U.S. District Court

CC: Counsel

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action
No. C-87-0022-L(M)

JAMES W. COLEMAN,

Plaintiff,

—against—

JOSEPH E. SEAGRAM & SONS, INC.,

Defendant.

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

AFFIDAVIT

ANN M. GIAMBUSSO, being duly sworn, deposes and says:

1. I am Human Resources Counsel for Joseph E. Seagram & Sons, Inc. ("Company" or "Seagram"), defendant in the above-referenced action. I am fully familiar with the facts herein. I submit this affidavit in opposition to Plaintiff's Motions (i) for Ruling on Omissions, (ii) for Ruling on Plaintiff's Motions Being Held In Abeyance Pending Defendant's Compliance With Order, and (iii) for Sanctions for Defendant's Refusal to Comply With Discovery Orders.

2. Since the commencement of this action in 1987, I have been the Seagram in-house attorney coordinating Seagram's defense of this action. In that capacity, I am responsible for, *inter alia*, supervising Seagram's response to discovery requests, including gathering relevant documents and verifying Answers to Interrogatories and Admissions.

3. Because Plaintiff has repeatedly accused Seagram of "withholding" documents, I have, on at least four separate occasions, directed Seagram employees to search Company files for additional documents relating to Plaintiff's employment and responsive to Plaintiff's discovery requests concerning other current and former Company employees. I have specifically directed that searches be made in Seagram's New York offices where the official Company Personnel Files of current employees and retirees (such as Plaintiff) are maintained, Seagram's off-premises records storage site at Glendale, New York and at Seagram's offices in Louisville and Cox's Creek, Kentucky and Lawrenceberg, Kentucky, where some files from the Louisville Research and Development facility at which Plaintiff was employed prior to the relocation of that department to White Plains, New York are located. Based on these searches, as more specifically described below, Seagram has produced (i) all documents relating to Plaintiff's job performance, (ii) all files maintained by Dr. Bluhm on the employees set forth in Plaintiff's September 6, 1989 letter, and (iii) all personnel files requested by Plaintiff on other current and former Seagram employees which are within Seagram's possession, custody or control. The Company has also previously produced documents and forms describing its policies and procedures concerning performance evaluations and merit reviews in effect during Plaintiff's employment with the Company which are responsive to Plaintiff's discovery requests forming the basis for Demand No. 6 in Plaintiff's Second Motion to Compel and the instant Motion for Ruling on Omissions.

4. When, in June of 1988, Plaintiff served his First Set of Interrogatories and Request for Production of Documents

which sought, *inter alia*, his personnel file and files maintained by Seagram's "supervisor/managerial employees . . . regarding the plaintiff", I directed that Seagram employees gather all such files relating to the employment of Plaintiff. Files were retrieved from Seagram's Human Resources Record Room, in which the official Company Personnel File is maintained, the Payroll Office, Seagram's New York Human Resources Department and Seagram's Research and Development Department in which Plaintiff had been employed prior to its move to White Plains, New York. All documents maintained within these various departmental files, as well as Plaintiff's official Company Personnel File, were gathered and forwarded in their entirety to Defendant's counsel Simpson Thacher & Bartlett, which already had a pre-existing file containing most of those documents that had been collected during its investigation (in which I was also involved) of a Complaint filed by Plaintiff in 1985 with the Equal Employment Opportunity Commission ("EEOC") and dismissed by that agency in 1986.

5. Seagram produced all of the documents contained in these files to Plaintiff on or about July 8, 1988, with the exception of an early draft of a response prepared by Simpson Thacher & Bartlett to Plaintiff's initial Complaint to the EEOC and correspondence and memoranda regarding that matter, which are withheld as privileged documents.

6. When, in August 1989, Plaintiff improperly served subpoenas *duces tecum* on two of the Company's employees (Dr. Leslie Bluhm and Mr. Robert Cherundolo), I directed that documents and forms describing the Company's policies and procedures concerning employee evaluations and merit reviews in effect during plaintiff's employment be gathered by Company employees. Approximately forty documents responsive to that request were gathered and forwarded to Simpson Thacher & Bartlett and subsequently produced to Plaintiff.

7. In addition to those documents and forms, Seagram had already produced in response to Plaintiff's First Request for

Documents a manual entitled "Personnel Procedure - Production Division" that had been used by the Company in the 1960's and 1970's. This manual contained some of the policies, rules and regulations applicable to Plaintiff during that period, but was not in effect after 1983. As was explained to Plaintiff's counsel in Seagram's Opposition to Plaintiff's Second Motion to Compel, since 1983 Seagram has not had any personnel manual or other comprehensive document setting forth employment practices or policies. Subsequently, in response to Plaintiff's Second Set of Interrogatories and Request for Documents, Seagram produced to Plaintiff a Seagram publication entitled "Your Guide to Seagram Benefits" which describes the benefits Plaintiff may have been entitled o during his employment.

8. When, by letter dated September 6, 1989, Plaintiff's counsel requested "the personnel files and/or merit review forms that Mr. Bluhm kept . . ." on certain named employees, I directed Dr. Bluhm to gather any of his personal supervisory files (which are not official Company files) regarding the employees set forth in Plaintiff's counsel's letter dated September 6, 1989. Dr. Bluhm advised me that while he had files on such employees containing documents dated after the move of the Louisville Research and Development Department to White Plains, he believed that his personal files on other employees which he maintained in Louisville prior to the move had been sent to Seagram's Human Resources Department in New York City and were no longer in his possession.

9. I gathered the files that were in Dr. Bluhm's possession and sent them to Simpson Thacher & Bartlett to prepare for production to the Plaintiff. I then directed Seagram employees to search for the files Dr. Bluhm believed he had sent to the New York Human Resources Department. The search for these files included Seagram's New York offices, including the Human Resources Department,[1] Seagram's off-site

[1] There were, of course, official Company Personnel Files for the employees and former employees included in Plaintiff's counsel's letter

storage facility at Glendale, New York, as well as Seagram's offices in Louisville and Cox's Creek, Kentucky. I am not aware of any other locations where these files might have been retained. The above-described search did not locate the files personally maintained by Dr. Bluhm prior to the relocation of the Research and Development Department to White Plains, New York. Seagram subsequently produced to Plaintiff the contents of the files on the listed employees maintained by Dr. Bluhm that were in his possession in White Plains as of the date of Plaintiff's request.

10. When, in April of 1991, Plaintiff served his Second Set of Interrogatories and Request for Production of Documents which sought, *inter alia*, the production of the personnel files of numerous past and present Seagram employees, I directed that Company employees gather the personnel files of the employees listed by Plaintiff in Request Nos. 1 and 2. Files were then retrieved from Seagram's Human Resources Records Room in New York, in which the official Company Personnel Files are maintained, the Payroll Office, Seagram's New York Human Resources Department and Seagram's Research and Development Department. All documents maintained within these various departmental files were gathered and forwarded to defendant's counsel, Simpson Thacher & Bartlett. The requested documents were produced to Plaintiff on or about June 18, 1991.

11. In response to Plaintiff's 66 Requests for Admissions asking, *inter alia*, Seagram to admit that it never had in its possession various personnel records of both an official and unofficial nature pertaining to Plaintiff and other employees at the Louisville Research and Development facility, I again directed that a thorough review be conducted of Company records in recognition of Seagram's obligation to respond to admission requests only after completing a reasonable inquiry into such requests. I directed Company employees to gather

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of September 6, 1989 maintained in Seagram's Human Resources Record Room in New York City, but they were not requested by Plaintiff at this time. (*See* Ohlweiler Affidavit, ¶ 22; Letter to Plaintiff's counsel dated April 6, 1993.)

responsive documents from Seagram's Human Resources Record Room, in which the official Company Personnel Files are maintained, Seagram's New York Human Resources Department and Seagram's Research and Development Department. A list of files maintained at the Human Resources Department at Seagram's Lawrenceberg, Kentucky facility concerning the Louisville Research and Development Department was also reviewed.

12. I also directed that all of Dr. Bluhm's own files be retrieved from Company off-site records storage facility at Glendale, New York and again reviewed to determine whether they contained any additional unofficial personnel records responsive to Plaintiff's request contained in his counsel's letter of September 6, 1989.[2] As was the case with the Company's original search of these files, no additional documents responsive to Plaintiff's discovery requests were found in these files.

13. Seagram completed the above-described search and review not only in response to Plaintiff's Requests for Admissions, but also in connection with Plaintiff's Second Motion to Compel which was served in January of 1993.[3] I reviewed outside counsel's planned response to the Second Motion to Compel in the context of my own review of Company files and found that all documents in Seagram's current possession, custody and control responsive to Plaintiff's discovery requests that formed the basis of his Second Motion to Compel had been produced to Plaintiff.

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[2] Dr. Bluhm had retired from Seagram by the time the Company received Plaintiff's Requests for Admission. Dr. Bluhm's personal files were as of this date comprised of work-related material completed by Dr. Bluhm during his tenure as Manager of the Research and Development Department in White Plains, *i.e.*, they contained no pre-relocation employee evaluations or other personal documents responsive to Plaintiff's discovery requests.

[3] Demand Nos. 2, 4 and 6 of Plaintiff's Second Motion to Compel form the substance of the instant Motion For Ruling On Omissions.

14. Specifically, in response to Demand No. 2 of Plaintiff's Second Motion to Compel, I verified that Seagram has no "performance summary" forms and "supervisor's notes", which are not official Company documents, for Doctors Gieger and Hirt as those terms have been defined in the context of this proceeding. In fact, Plaintiff has never requested the production of the official Company Personnel Files for either of these individuals. (*See* Ohlweiler Affidavit, ¶23 and footnote 8.)

15. I verified that Seagram has already produced to Plaintiff all of the personnel files within Seagram's possession and control that would contain performance evaluations on individuals identified in Demand No. 4 of Plaintiff's Second Motion to Compel.

16. Finally, with respect to Demand No. 6 of Plaintiff's Second Motion to Compel, I verified that, as was explained to Plaintiff in Seagram's responses to both Plaintiff's First and Second Request for Documents, since 1983 Seagram has not had any personnel manual or other comprehensive document setting forth Company employment policies or practices responsive to Plaintiff's request. As such, it is the Company's belief that it has complied in a fully responsive manner with respect to Plaintiff's requests which complies the basis of Demand No. 6. (*See* ¶¶6-7, *supra*)

17. When, on June 11, 1993, the Court ordered Seagram "to produce for inspection within (30) days of the date of entry of this order at the offices of its local counsel . . . the 'personnel records' of the following former or current employees of the defendant : [Ruf], Bailey, Wagener, Maisch, Weber, Bronsky, Wolfram, Baldwin, Coffey, Panek, Scalf, Sanders, Bosworth, Wathen, Luther and Wang," I directed that another search of Seagram facilities be completed similar to the search described in the preceding Paragraphs 10 through 12. I directed that the original Company Personnel Files, and any unofficial personnel-related material located with respect to the named individuals, be gathered and forwarded to Defendant's counsel, Simpson Thacher & Bartlett, even

though the content of these files had for the most part already been produced to the Plaintiff.[4] The original documents were produced for Plaintiff's review and copying in Louisville on July 9, 1993.

18. Seagram is not now, nor has it ever, wilfully concealed from Plaintiff any Company document responsive to any of his requests for documents which form the basis of the Motions currently pending before the Court herein. Rather, at substantial expense to the Company, I have directed on no less than four (4) separate occasions that searches be conducted at Seagram facilities either known, or believed to be reasonably likely to contain the employee records sought by Plaintiff throughout this proceeding. On each occasion, I forwarded all responsive material yielded by the respective searches to Seagram's counsel, Simpson Thacher & Bartlett, which in turn produced the material to Plaintiff. As such, Plaintiff's own belief, unsubstantiated in fact, that Seagram possesses additional discoverable material simply is untrue.

19. Seagram has produced (i) all documents relating to Plaintiff's job performance, (ii) all files maintained by Dr. Bluhm on the employees set forth in Plaintiff's September 6, 1989 letter, and (iii) all personnel files requested by Plaintiff on other current and former Seagram employees in Plaintiff's Second Set of Interrogatories and Request for Production which are within the possession, custody or control of the Company. Further, Seagram has complied in a fully responsive manner to Plaintiff's Production Request No. 12 of his Second Set of Interrogatories and Request for Production relating to copies of defendant's generally applicable personnel practices and procedures.

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[4] The only documents contained in those files not previously produced to Plaintiff were documents placed in the files after they had been produced and which pertained primarily to benefits.

/s/ ANN M. GIAMBUSSO
Ann M. Giambusso

Sworn to before me this
15th day of September, 1993.

/s/ KAREN E. MOLONEY
Notary Public